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JUST COMPENSATION IN EMINENT DOMAIN. — There has been much confusion, in the authorities, on the measure of damages in eminent domain proceedings. In *New York* v. *Sage*, 36 Sup. Ct. Rep. 25, the Supreme Court has helped materially to clarify the issues. In valuing a farm taken by New York City to form a portion of a great reservoir, the commissioners awarded a certain sum for the "land and buildings," and a certain further sum for "reservoir availability." The case was removed to the federal courts on diversity of citizenship. In overturning the award, the court decided that the only explanation of the itemization was that the first sum was the actual total market value, and that the commissioners thought that the value gained by the very act of taking was to be shared between the city and the owner. Assuming this to be the correct interpretation, the award obviously could not be sustained. The question is what the owner loses, not what the taker gains.[1] But since every intendment is to be made in favor of an award,[2]

[1] Boston Chamber of Commerce *v.* Boston, 217 U. S. 189; United States *v.* Chandler-Dunbar Co., 229 U. S. 53; Lambert *v.* Giffin, 257 Ill. 152, 100 N. E. 496; United States *v.* Taffe, 78 Fed. 524. Yet where compensation for the taking of an abandoned stretch of railroad track was allowed upon the basis of cost of construction, the taker's gain was practically made the basis of assessing damages. Cohen *v.* St. Louis, F. S. & W. R. Co., 34 Kan. 158, 8 Pac. 138. There are, of course, cases where market value breaks down altogether as a measure of just compensation. Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 22 So. 219.

[2] See McGovern *v.* New York, 229 U. S. 363, 371.

there is much to be said for the interpretation evidently adopted by the Circuit Court of Appeals,[3] as well as the District Court,[4] in this case, that reservoir availability was intended by the commissioners as only an element in actual market value.

The Supreme Court clearly states, however, that any portion of the market value caused by the expectation of the taking by eminent domain should not be allowed as damages. There is much authority, both English and American, against this view,[5] and it seems to mark a departure, even in its own jurisdiction.[6] If there is an appreciable possibility that the land may be wanted for the purpose in question by purchasers not armed with compulsory powers, the chance forms an element of market value which unquestionably must be considered.[7] But where, as is certainly the case in constructing railroads, and must generally be the case in constructing a very large reservoir, the market is not appreciably affected by such a possibility, this reasoning fails.[8] Two grounds might

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[3] *In re* Bensel, 206 Fed. 369.

[4] *In re* Ashokan Dam, 190 Fed. 413.

[5] In the leading English case, the Court of Appeals clearly formulated the issue, and arrived at the opposite conclusion. See *In re* Lucas, [1909] 1 K. B. 16, 28. The court distinguished between the enhancement of market value due to the "probability" of eminent domain proceedings, and the enhancement due to the "realized probability," after the proceedings have been initiated, and concludes that the former, but not the latter, should be an element in computing damages. See also Sidney *v.* North Eastern Ry. Co., [1914] 3 K. B. 629. The prevailing view is clearly stated by the Massachusetts court in Moulton *v.* Newburyport Water Co., 137 Mass. 163, 167: "Such chance or probability, [i.e. that the land might be used as a source of water supply by a company with power of eminent domain] must needs enter to some extent into the market value itself: and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it." For other American cases see note 8, *infra*.

[6] In United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 77, the court, in allowing "lock availability" as an element in value, said: "Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose."

[7] This seems to be the true ground on which Boom Co. *v.* Patterson, 98 U. S. 403, can be supported. The court allowed compensation for the availability of land for boom purposes, mentioning the fact that there might have been a demand for the land for these purposes by purchasers without compulsory powers. The case has been widely interpreted, however, as standing for a broader doctrine. See United States *v.* Chandler-Dunbar Co., *supra*, 229 U. S. 53, 77; Webster *v.* Kansas City & S. Ry. Co., 116 Mo. 114, 119, 22 S. W. 474, 475; San Diego Land and Town Co. *v.* Neale, 78 Cal. 63, 69, 20 Pac. 372, 375.

Perhaps the following cases may rest upon the possibility of such purchasers, the reservoir being comparatively small. Alloway *v.* Nashville, 88 Tenn. 510, 13 S. W. 123; Brown *v.* Forest Water Co., 213 Pa. St. 440, 62 Atl. 1078; Matter of Trustees of College Point, 5 T. & C. (N. Y.) 217. Where the owner intends to use the land himself to supply nearby towns with water, he may not show this fact in evidence. Farmer *v.* Stillwater Water Co., 99 Minn. 119, 108 N. W. 824. Nor may he swell the damages by showing the possibility of getting authority to carry the water to nearby towns. Moulton *v.* Newburyport Water Co., 137 Mass. 163. But if it were possible for him so to use his land it would be possible for a purchaser without compulsory powers to so use it, and thus the case would be proper for allowing the special availability to be shown.

[8] The railroad availability of property has been repeatedly allowed as an element in value. Currie *v.* Waverly, etc. R. Co., 52 N. J. L. 381, 20 Atl. 56; Webster *v.* Kansas City & St. Ry. Co., 116 Mo. 114, 22 S. W. 474; Johnson *v.* Freeport, etc. R. Co., 111 Ill. 413; Sidney *v.* North Eastern Ry. Co., [1914] 3 K. B. 629. See LEWIS,

be suggested on which a prospective demand for property by a body armed with compulsory powers could be made the basis of a higher valuation in eminent domain proceedings. It may often be the case that the tribunals fixing the compensation are more favorably disposed toward landowners than the condemning corporations, and may tend to award more than the fair value of the land. Certainly if this cause is operative at all, it is unfortunate enough of itself without recognition by the law of its reflection in market value. The argument leads to the result that the court must instruct the jury in assessing damages to take into account its own probable bias in favor of one of the parties. Again, it might be urged that to avoid the trouble and expense of compulsory proceedings, corporations may be willing to buy the land for more than it would be worth for purposes other than those for which it is to be used.[9] Yet if it has in fact been put to the expense of such proceedings, it is not just to require it to pay the expense over again, as a part of the award.

Generally, however, the courts have not assigned any particular reason for their decision, but have assumed without further analysis that a prospect of compulsory taking enhances the market value of the land, and should be reflected in the compensation allowed. It is submitted that the whole doctrine leads to a perpetual trip around a vicious circle. If the prospect of a generous award is reflected in a higher market value, and this higher market value is then made the basis for an increased award, it follows that the promise of this larger award will once more enhance the value, and that, conformably with the theory, a new increment must be added to the award. An infinite series results.

The decision in the principal case would therefore be sound, even if the interpretation put upon the award by the lower court is the correct one. Not only was it erroneous to add an item for "reservoir availability," but if that item was already an element in the sum awarded as market value the item should have been deducted from that sum to reach a just result.[10] To allow a purchaser to exact a high price for his lands simply because they are very necessary to the public is to defeat the whole purpose of eminent domain.[11]

EMINENT DOMAIN, 3 ed., § 707. The English cases uniformly allow reservoir availability. *In re* Lucas, [1908] 1 K. B. 571, [1909] 1 K. B. 16; *In re* Gough, [1904] 1 K. B. 417; Riddell *v.* Newcastle, etc. Water Co., Brown & Allen, Compensation, 678; *In re* Countess Ossalinsky, *ibid.*, 659. Bridge site availability has been considered, although purchasers without compulsory powers must be rare. Young *v.* Harrison, 17 Ga. 30; Little Rock, etc. R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792. The United States Supreme Court has allowed lock availability. United States *v.* Chandler-Dunbar Co., 229 U. S. 53.

[9] It is unreasonable to suppose that a purchaser armed with eminent domain powers would allow itself to be taken advantage of. See Minnesota Rate Cases, 230 U. S. 352, 451. Although it is perhaps true that but a small percentage of the property acquired for public purposes is through the actual exercise of the power. See Little Rock, etc. R. Co. *v.* Woodruff, 49 Ark. 381, 393, 5 S. W. 792, 795. And it is common to require that a petition show a failure to agree. See MILLS, EMINENT DOMAIN, § 107.

[10] Matter of Simmons, 130 App. Div. (N. Y.) 350, 195 N. Y. 573; Union Depot, etc, Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626; United States *v.* Seufert Bros. Co., 78 Fed. 520; Matter of Boston, etc. R. Co., 22 Hun (N. Y.) 176; Black River, etc. R. Co. *v.* Barnard, 9 Hun (N. Y.) 104.

[11] If the case is rested on the broad doctrine here outlined, it involves only the establishment of a rule for the federal courts, and not an overturning of settled law in the states, for the Supreme Court will not decide questions in the law of damages under

THE DISQUALIFICATION OF JUDGE HILLYER IN THE COLORADO STRIKE CASES. — At common law the only ground for the disqualification of a judge was a pecuniary or personal interest in the subject matter of the cause.[1] But there are statutes in almost all the states providing that a judge is disqualified if he has been of counsel or if he is biased or prejudiced.[2] The party objecting must put in a verified affidavit that the judge is prejudiced or interested. Ordinarily the facts on which the conclusion is based must be positively stated,[3] but in some states a mere statement of the conclusion is enough.[4] The latter rule, however, seems unwise, for it offers an easy method of delaying the proceedings without the check imposed by the danger of a prosecution for perjury if false facts are stated in the affidavit. It is usually held that the disqualification statutes are mandatory, and that when a proper affidavit is filed the judge is *ipso facto* disqualified, and has no jurisdiction. That is, the judge may pass upon the sufficiency of the affidavit, but not upon the truth of the facts stated therein;[5] it is the imputation of prejudice, not the actual existence of the alleged grounds of imputation, which causes the disqualification. Any other rule would violate the well-settled principle that a man cannot be judge in his own cause, and practically defeat the purpose of the statutes, since it is only in extreme cases that a man can realize his prejudice.[6] Moreover, a decision on the truth or falsity of the allegations would be a decision of a question of fact, and not reviewable, except for abuse of discretion. Nevertheless, a few states have adopted a contrary rule,[7] and others, though follow-

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the due process clause of the Constitution. McGovern *v.* City of New York, 229 U. S. 363.

[1] People *v.* Williams, 24 Cal. 31 (prejudice). See People *v.* Compton, 123 Cal. 403, 56 Pac. 44, 48.

[2] For typical statutes, see U. S. COMP. STAT. 1913, § 988; MILLS ANN. STAT. (COLO.), § 7692; MONT. REV. CODES, § 6315.

Generally, only one judge may be disqualified in each case; but the Montana statute permits five disqualifications. See State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

[3] *Ex parte* Am. Steel Barrel Co., 230 U. S. 35; Powers *v.* Reynolds, 89 Ky. 259, 12 S. W. 298. See Erbaugh *v.* People, 57 Colo. 48, 52, 140 Pac. 188, 190; People *v.* Findley, 132 Cal. 301, 304, 64 Pac. 472, 473.

[4] Lincoln *v.* Territory, 8 Okl. 546, 58 Pac. 730; State *v.* Palmer, 4 S. D. 543, 57 N. W. 490.

[5] Powers *v.* Commonwealth, 114 Ky. 237, 70 S. W. 644; Murdica *v.* State, 137 Pac. 574 (Wyo.); State *v.* Palmer, 4 S. D. 677, 62 N. W. 631; Erbaugh *v.* People, 57 Colo. 48, 140 Pac. 188; Cox *v.* United States, 100 Fed. 283.

The normal way to attack the judge's ruling in such a case is by writ of error; but an application for a writ of prohibition is also a proper method, even though the judge, and not the court, loses jurisdiction. This is true whether the judgment is voidable, on account of a common-law disqualification, or void, as when the disqualification is statutory. Forest Coal Co. *v.* Doolittle, 43 W. Va. 210, 46 S. E. 238; North Bloomfield Gravel Mining Co. *v.* Keyser, 58 Cal. 315. See Dimes *v.* Grand Junction Canal, 3 H. L. 759, 785; Moses *v.* Julian, 45 N. H. 52, 54.

Of course, when the application is for a change of venue on account of popular feeling, counter affidavits may be filed, and the judge must pass on the facts. See State *v.* Palmer, 4 S. D. 543, 545, 57 N. W. 490, 491.

[6] The late Judge Brewer is quoted in Lincoln *v.* Territory, 8 Okl. 546, 58 Pac. 730, as saying, "All experience teaches that usually he who is prejudiced against another is unconscious of it, or unwilling to admit it."

[7] State *v.* DeMaio, 70 N. J. L. 220, 58 Atl. 173; Moses *v.* Julian, 45 N. H. 52. This rule is usually based on the wording of the local statutes. Thus, Cox *v.* United